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No. 06-219

In the Supreme Court of the United States

CHARLES WILKIE, ET AL., PETITIONERS

v.

HARVEY FRANK ROBBINS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

Page

Introduction 1
I. This case involves the management of public lands, not an intrusion on private land 2
II. Respondent has failed to show a RICO violation 4
III. Respondent has failed to show any actionable violation of the Fifth Amendment 9
A. There is no basis to extend *Bivens* to this new context 9
B. Respondent has not alleged the violation of any right protected by the Just Compensation Clause 12
IV. Petitioners are entitled to immunity 16
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Aetna Heath Inc. v. *Davila*, 542 U.S. 200 (2004) 18
Anderson v. *Creighton*, 483 U.S. 635 (1987) 17, 18, 19
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) ..... *passim*
Brosseau v. *Haugen*, 543 U.S. 194 (2004) 17
Bush v. *Lucas*, 462 U.S. 367 (1983) 12
Butz v. *Economou*, 438 U.S. 478 (1978) 18
Correctional Servs. Corp. v. *Malesko*, 534 U.S. 61 (2001) 12
Cullinan v. *Abramson*, 128 F.3d 301 (6th Cir. 1997), cert. denied, 523 U.S. 1094 (1998) 18
Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 11, 14
Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 14

Cases—Continued: Page

Edgcomb v. *Lower Valley Power & Light, Inc.*, 922 P.2d 850 (Wyo. 1996) 5
Evans v. *United States*, 504 U.S. 255 (1992) 7
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 6, 7, 18
Hartman v. *Moore*, 126 S. Ct. 1695 (2006) 9, 10
Hiler v. *Brown*, 177 F.3d 542 (6th Cir. 1999) 9
Hill v. *Department of the Air Force*, 884 F.2d 1318 (10th Cir. 1989), cert. denied, 495 U.S. 947 (1990) 9
Hooe v. *United States*, 218 U.S. 322 (1910) 10
Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 11, 13, 15
Lhotka v. *United States*, 114 F.3d 751 (8th Cir. 1997) 5
Linne v. *Rideoutte*, 971 F.2d 766 (D.C. Cir. 1992), cert. denied, 507 U.S. 1004 (1993) 18
Meredith v. *Federal Mine Safety & Health Review Comm'n*, 177 F.3d 1042 (D.C. Cir. 1999) 9
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 9
Nebraska Beef, Ltd. v. *Greening*, 398 F.3d 1080 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006) 9
Nollan v. *California Coastal Comm'n*, 483 U.S. 825 (1987) 11, 14, 15
Northwest La. Fish & Game Preserve Comm'n v. *United States*, 446 F.3d 1285 (Fed. Cir. 2006) 6
Pelletier v. *Federal Home Loan Bank*, 968 F.2d 865 (9th Cir. 1992) 9
Preseault v. *ICC*, 494 U.S. 1 (1990) 10
Richardson v. *McKnight*, 521 U.S. 399 (1997) 19
Ruckelshaus v. *Monsanto, Co.*, 467 U.S. 986 (1984) 13
Saucier v. *Katz*, 533 U.S. 194 (2001) 17, 19

Cases—Continued: Page:

Scheidler v. *NOW*, 537 U.S. 393 (2003) 8
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 9, 12
Sinclair v. *Hawke*, 314 F.3d 934 (8th Cir. 2003) 17
Tennessee Student Assistance Corp. v. *Hood*, 541 U.S. 440 (2004) 18
Thillens, Inc. v. *Community Currency Exch. Ass'n of Ill., Inc.*, 729 F.2d 1128 (7th Cir.), cert. dismissed, 469 U.S. 976 (1984) 18
Tower v. *Glover*, 467 U.S. 914 (1984) 18
United States v. *Bonanno Organized Crime Family*, 879 F.2d 20 (2d Cir. 1989) 6
United States v. *Cooper Corp.*, 312 U.S. 600 (1941) 6
United States v. *North Am. Transp. & Trading Co.*, 253 U.S. 330 (1920) 10
United States v. *Olson*, 126 S. Ct. 510 (2005) 5
USPS v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004) 6
Washoe County v. *United States*, 319 F.3d 1320 (Fed. Cir. 2003) 6
Williamson County Reg'l Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172 (1985) 10
Wyatt v. *Cole*, 504 U.S. 158 (1992) 18, 19
Zimbelman v. *Savage*, 228 F.3d 367 (4th Cir. 2000) 9

Constitution, statutes, regulation and rule:

U.S. Const.:
Amend. I 16
Amend. III 13
Amend. V ..... *passim*

Constitution, statutes, regulation and rule: Page

Due Process Clause 12
Just Compensation Clause ..... *passim*
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 1
Federal Tort Claims Act, 28 U.S.C. 1346 1
Hobbs Act, 18 U.S.C. 1951 5
Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* 1
Sherman Act, § 7, 15 U.S.C. 6a (1952) 6
Tucker Act, 28 U.S.C. 1491 1
43 C.F.R. 4130.3-2(h) 4
Sup. Ct. R. 15.2 18

Miscellaneous:

BLM Wyoming, *2005 Annual Report to the Public* 11
Frank Robbins:
146 I.B.L.A. 213 (1998) 4
154 I.B.L.A. 93 (2000) 4
167 I.B.L.A. 239 (2005) 4
R. Perkins & R. Boyle, *Criminal Law* (3d ed. 1982) 7

INTRODUCTION

The interspersed nature of public and private lands in the West, and the federal government's responsibility for managing public lands, creates numerous sources of potential friction among landowners. Congress and the Bureau of Land Management (BLM), in turn, have provided numerous avenues to address private landowners' complaints. Landowners may file an action under the Tucker Act, 28 U.S.C. 1491, for just compensation for any physical taking of their property, or for any regulation that they claim *amounts* to a taking. They may seek to enjoin conduct that they claim will amount to an uncompensated taking. They may challenge any alleged trespass or related invasion under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346. They may challenge regulatory actions through agency procedures, such as the Interior Board of Land Appeals (IBLA). And they may challenge any final agency action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*

Respondent alleges that the government has interfered with his property rights, but he does not seek to invoke any of those established mechanisms. Although his Fifth Amendment claim is grounded solely on the Just Compensation Clause (see Br. 11 n.11), he has not alleged either a physical or regulatory taking. He has not sought relief under the FTCA or the APA. And, while he has filed numerous administrative claims—all of which have been rejected by the IBLA—he now claims (Br. 9-10) that the available administrative process is too burdensome to exhaust. Instead, respondent asks this Court to recognize an action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, carrying the threat of treble damages against federal officials in their personal capacities, and a new constitutional tort against federal officials under the Just Compensation Clause and *Bivens* for virtually any alleged interference with a property owner's state law right to exclude.

Not only would respondent's theory require this Court to expand dramatically the scope of *Bivens*, the Just Compensation

Clause, and RICO, it would severely undermine the government's ability to manage the millions of acres of public lands that are interspersed with private lands in the West. Neither respondent nor his amici have provided any reason for the Court to take such an extraordinary step. And they certainly have provided no reason for this Court to deprive petitioners of qualified immunity from the novel damages claims before the Court.

I. THIS CASE INVOLVES THE MANAGEMENT OF PUBLIC LANDS, NOT AN INTRUSION ON PRIVATE LAND

Because respondent's theory of the case has evolved, it is worth reviewing the basic dispute that gave rise to this action. This case began as a challenge to BLM's decision to cancel a right-of-way over a 14-mile stretch of public land granted to the prior owner of the High Island Ranch after respondent refused to consent to a 4-mile reciprocal easement over private lands in the area. See J.A. 89 (illustrating easement). The easement was sought to ensure that BLM would be able to cross interspersed parcels of private land in order to reach public lands adjacent to the upper northwest portion of the High Island Ranch, located in the Rock Creek allotment. See J.A. 136 (map). Access to that area was necessary, among other things, to reach a wilderness study area and to manage critical wildlife habitats (including an Elk calving area) as well as the Rock Creek allotment itself. BLM canceled the right-of-way after respondent declined to grant the reciprocal easement and failed to pay the required rental on the right-of-way. See C.A. App. 42-43.[1]

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[1] Respondent claims (Br. 4) that the reciprocal easement and the right-of-way were "markedly unequal." That is incorrect. The right-of-way had a duration of 30 years and applied to a 14-mile stretch of public lands, whereas the reciprocal easement for the government had a duration of 20 years and applied to a 4-mile stretch of respondent's land. Respondent points (Br. 4) to differences concerning the use of the easement by mining companies, but those differences merely reflect the fact that the government owns the subsurface mineral rights to both the public and private lands at issue.

Respondent now concedes (Br. 6) that it was at least "plausible" for BLM to maintain that "respondent had a legal duty to give the BLM an easement [over private land] in exchange for a right-of-way [over public land]." And federal law permits BLM to secure such commonsense, reciprocal arrangements. Pet. Br. 3-4. As a result, respondent has shifted his focus away from this reciprocal arrangement to discrete regulatory actions that BLM undertook in the course of managing public lands in the area. Specifically, respondent now grounds his RICO and Fifth Amendment claims on alleged "harassment, selective enforcement of regulations, filing false criminal charges, and trespassing." Resp. Br. 46; see *id.* at 6-10. Each of those alleged actions was amenable to challenge through administrative complaints or specific judicial remedies, and respondent unsuccessfully attempted to challenge many (though not all) of them before the IBLA. See Pet. Br. 6-8.

Moreover, BLM took each of the alleged actions in fulfilling its duty to manage public lands. The alleged "harassment" of respondent's cattle drives was based on BLM's efforts to document respondent's trespasses on public lands. Many of those trespasses were on grazing allotments assigned to neighboring ranchers who complained to BLM about respondent's repeated trespasses on their allotments. See C.A. Supp. App. 931-933, 1003-1005. The alleged selective enforcement was based on respondent's trespasses and other violations of the terms of his grazing permits and special use permits. Those violations resulted in BLM's decisions not to renew respondent's permits, actions that were upheld by the IBLA. The alleged false criminal charges were brought after respondent physically impeded BLM officers who were exercising the right of administrative access to reach public lands. And the alleged trespasses were based on BLM's efforts to monitor respondent's use of public lands.

All of the administrative actions on which respondent focuses concern alleged trespasses by BLM officials seeking to access interlocked parcels of public land, and all of them relate to respon-

dent's disagreement with formal IBLA adjudications confirming that respondent's grazing and recreational use permits provide BLM a right of administrative access over respondent's land to protect interlocking parcels of public land and ensure compliance with the terms of the permits. See 154 I.B.L.A. 93, 95-96 (2000); see also 43 C.F.R. 4130.3-2(h); C.A. App. 61. Respondent declined to invoke his right under the APA to challenge the results of those IBLA proceedings in federal court.[2]

In short, while respondent seeks to portray himself as a victim of federal intrusion on his land, this case involves one landowner's insistence on enjoying the benefits of *public* lands while refusing to honor the responsibilities that the government has long required of those who use the public domain, in order to protect and preserve public lands and resources. Neither RICO, the Fifth Amendment, nor *Bivens* gives a landowner a right to insist on such a one-sided land use regime.

II. RESPONDENT HAS FAILED TO SHOW A RICO VIOLATION

As petitioners have explained (Br. 15-27), respondent's RICO claim suffers from two fatal flaws. First, RICO—an organized crime statute—was never designed to reach federal officials acting within the scope of their authority to further legitimate governmental aims, such as public land management. Second, to

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[2] For example, in the IBLA proceeding upholding BLM's decision not to renew respondent's recreational use permit over public lands, the IBLA cited respondent's "pattern of violating the terms and conditions of his various public use authorizations," including the fact that respondent had been "cited for trespass for unauthorized blading of a road on pulic lands, been in noncompliance with his grazing permit on at least 20 occasions, and received formal notices regarding 11 different grazing trespasses, 7 of which settled and 4 of which are the subject of pending [IBLA] appeals." 154 I.B.L.A. at 98; see *id.* at 94-95. The IBLA decisions also recognized and endorsed BLM's practice of photographing or videotaping respondent's trespasses, including unauthorized cattle drives, on public lands. 167 I.B.L.A. 239, 247 n.8 (2005). The IBLA also found that the administrative record shows that "intransigence was the tactic of [respondent], not BLM." 146 I.B.L.A. 213, 219 (1998).

establish the predicate offense of extortion, a plaintiff must show both that government officials act with a "wrongful" intent, *i.e.*, that officials seek something of value that they are not due in exchange for official conduct, and that the officials actually "obtain" something of value for the private benefit of themselves or another. Neither of those traditional elements of the common law offense of extortion is present here.

Respondent concedes that no court has applied RICO against public officials acting pursuant to their lawful authority to obtain a reciprocal property interest on behalf of the United States. He also concedes (Br. 42) that the predicate offense of extortion "prohibits only 'wrongful' conduct and punishes only willful violations" of the Hobbs Act, 18 U.S.C. 1951. Moreover, respondent "accepts that the Hobbs Act would not be violated here if Congress had authorized petitioners to engage in [the challenged administrative actions]." Resp. Br. 46. But, notwithstanding respondent's unfounded and pejorative labels for the challenged regulatory actions, the court of appeals expressly assumed that "*each*" of the administrative actions about which respondent complains was authorized. Pet. App. 17a-18a (emphasis added). The court nevertheless held that the allegation of an intent to "extort" made their otherwise lawful regulatory conduct extortion under RICO. *Id.* at 18a. That holding cannot stand.

As an initial matter, there is no evidence that Congress intended RICO to apply to the types of administrative actions at issue here, particularly given that those actions are already subject to review by the APA, the FTCA (in cases of torts, such as trespass, committed by government officials), and the Tucker Act (in cases of physical or regulatory takings of property).[3] The

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[3] The FTCA waives the United States' sovereign immunity from suit where local law would make a private person liable in tort. See *United States* v. *Olson*, 126 S. Ct. 510, 512 (2005). States, including Wyoming, recognize the tort of trespass and typically define it in terms of the "right to exclude." See, *e.g.*, *Edgcomb* v. *Lower Valley Power & Light, Inc.*, 922 P.2d 850, 859 (Wyo. 1996). There are FTCA cases involving trespass claims, see, *e.g.*, *Lhotka* v. *United*

government itself could not be held liable under RICO for the administrative actions in question. See, *e.g.*, *United States* v. *Bonanno Organized Crime Family*, 879 F.2d 20, 21-27 (2d Cir. 1989) (United States is not a "person" who can sue or be sued under RICO, because Congress did not intend "to expose the government to RICO liability"); cf. *United States* v. *Cooper Corp.*, 312 U.S. 600, 604-606 (1941) (employing similar reasoning in holding that the United States was not a "person" that could sue or be sued under Section 7 of the Sherman Act); accord *USPS* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 743-745 (2004). Respondent cannot avoid Congress's decision to exclude the *government* from the reach of RICO liability by alleging that BLM itself "is an enterprise within the meaning of [RICO]." J.A. 76. Nor can he circumvent that limitation attacking BLM officials acting pursuant to their legal authority and seeking to obtain a reciprocal easement for the "UNITED STATES OF AMERICA, and its assigns," see J.A. 90.

Respondent does not attempt to defend the court of appeals' holding that the applicability of RICO turns solely on the subjective intent of government officials. See Pet. App. 18a. That holding is seriously flawed and in itself requires reversal. As this Court recognized in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982), "substantial costs attend the litigation of the subjective good faith of government officials." "Judicial inquiry into subjective motivation" often is incapable of resolution without protracted discovery and fact-finding. *Id.* at 817. As a result, "[i]nquiries of this kind can be peculiarly disruptive of effective

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States, 114 F.3d 751, 753-754 (8th Cir. 1997), as well as cases involving both trespass claims under the FTCA and takings claims under the Tucker Act, see, *e.g.*, *Northwest La. Fish & Game Preserve Comm'n* v. *United States*, 446 F.3d 1285, 1289-1291 (Fed. Cir. 2006). Respondent filed an administrative tort claim. That claim was denied, and he did not pursue any FTCA action in court. Similarly, a landowner may challenge the government's denial of a right-of-way as a taking under the Tucker Act. See, *e.g.*, *Washoe County* v. *United States*, 319 F.3d 1320, 1325-1328 (Fed. Cir. 2003).

government"—causing "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 816-817. Subjecting government officials to the threat of RICO liability for "lawful actions" (Pet. App. 18a) depending solely on their subjective "intent" (*ibid.*) would impose all of the costs that this Court recognized in *Harlow*, not to mention create an especially potent deterrence to public service given the threat of treble damages.

In any event, it makes no sense to speak of an "extortionate" or "wrongful" intent in the context of a RICO claim against government officials where those officials acted within their regulatory authority and there is no allegation that the officials acted in exchange for a private gain for themselves or another. See Pet. 18-23. Indeed, in *Evans* v. *United States*, 504 U.S. 255, 260 (1992), the Court observed that "[e]xtortion by the public official was the rough equivalent of what we would now describe as 'taking a bribe.'" See R. Perkins & R. Boyle, *Criminal Law* 528 (3d ed. 1982) ("Bribery is the corrupt payment or receipt of a *private price* for official action.") (emphasis added).

Respondent now concedes (Br. 6, 14) that it was at least "plausible" for BLM to seek a *reciprocal* easement from respondent. That concession alone is fatal to his claim that the alleged attempt to obtain an easement for the United States was "wrongful" and thus extortionate. Moreover, as discussed, respondent has essentially abandoned reliance on BLM's cancellation of his right-of-way as a basis for his RICO and *Bivens* claims, and instead now relies on a litany of alleged administrative actions that relate to alleged trespasses by BLM officials seeking to access interlocked public lands. But there is nothing "extortionate" about such alleged trespasses. Rather, they boil down to disputes between adjoining public and private landowners about the existence and scope of the government's right of administrative access over private land to inspect and manage interlocking parcels of public land. Moreover, as discussed, the IBLA affirmed the government's right of administrative access. See p. 4, *supra*.

In addition, respondent's RICO claim fails because respondent cannot establish that petitioners "obtain[ed]" his property within the meaning of the Hobbs Act and the common law offense of extortion. See Pet. Br. 22-23. As this Court has observed, "[e]xtortion under the Hobbs Act requires a 'wrongful *taking* of . . . property.'" *Scheidler* v. *NOW*, 537 U.S. 393, 404 (2003) (internal quotation marks and citation omitted); see *Evans*, 504 U.S. at 260 n.4 (quoting definitions). In *Scheidler*, this Court refused to replace the Hobbs Act's requirement "that property must be *obtained* from another * * * with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion." 537 U.S. at 405 (emphasis added). Thus, the Court concluded that there was "no basis" for the extortion claim, even though there was "no dispute * * * that petitioners interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights." *Id.* at 404; see *id.* at 409 (distinguishing extortion from the common law offense of coercion).

The RICO extortion claim in this case fails for the same reason. The "essence of respondent's claim" (Br. 35) is that the government has *not* taken his property, but instead has sought to "coerce" (J.A. 76, 77 (complaint)) him to give property to the government (which he has not done). Thus, even if it were true that petitioners "interfered with, disrupted, and in some instances completely deprived respondent[] of [his] ability to exercise [his] property rights," under *Scheidler* there would still be "no basis" upon which to find extortion. 537 U.S. at 404, 409. Moreover, to the extent that respondent's claim is that BLM's regulatory actions have interfered with his ability to "conduct his business" (Br. 24), then the alleged interference with property in this case is even more directly analogous to the alleged interference in *Scheidler*. See 537 U.S. at 401, 404-405.

III. RESPONDENT HAS FAILED TO SHOW ANY ACTIONABLE VIOLATION OF THE FIFTH AMENDMENT

A. There Is No Basis To Extend *Bivens* To This New Context

As petitioners explained in their opening brief (Br. 27-37), respondent's *Bivens* claim under the Just Compensation Clause of the Fifth Amendment is precluded by statutory remedies, as well as the nature of the Just Compensation Clause itself. At the very least, there are powerful reasons counseling hesitation in fashioning such a new constitutional tort.

1. As an initial matter, the *Bivens* preclusion issue is properly before the Court. See Pet. Cert. Reply Br. 5-10. The question whether there is a violation of any *actionable* right is necessarily subsumed within the question whether there is the violation of any right. Qualified immunity would be a largely hollow protection if government defendants were required to suffer through a trial even where it could be determined at the outset purely as a matter of law that the right allegedly violated is not actionable at all. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 526-528 (1985). Accordingly, as several courts of appeals have concluded, where the *Bivens* action is precluded by the availability of another remedy and the plaintiff therefore has no cause of action, the defendants are entitled to have the action against them dismissed in conjunction with their qualified immunity appeal.[4]

In *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), this Court considered whether plaintiff's claims were actionable under *Bivens* where the court of appeals had reversed the dismissal of a case on the ground of qualified immunity. In addition, in *Hartman* v.

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[4] *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1083-1084 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006); *Zimbelman* v. *Savage*, 228 F.3d 367, 370-371 (4th Cir. 2000); *Hill* v. *Department of the Air Force*, 884 F.2d 1318, 1320 (10th Cir. 1989), cert. denied, 495 U.S. 947 (1990); see also *Meredith* v. *Federal Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1048-1052 (D.C. Cir. 1999); *Hiler* v. *Brown*, 177 F.3d 542, 544 (6th Cir. 1999). But see *Pelletier* v. *Federal Home Loan Bank*, 968 F.2d 865, 871 (9th Cir. 1992).

Moore, 126 S. Ct. 1695, 1702 n.5 (2006), the Court held that it had jurisdiction in a qualified immunity appeal to address the elements of a *Bivens* action for malicious prosecution and retaliatory prosecution, because the question of the elements of the *Bivens* claim was "directly implicated by the defense of qualified immunity" and was therefore "properly before [the Court] on interlocutory appeal." The same goes here, where the antecedent question is whether any *Bivens* action is available at all. If anything, the question whether there is *any* constitutional tort is even more appropriate for resolution at this stage than the "definition of an *element* of the tort." *Ibid.* (emphasis added).

2. *Bivens* is fundamentally ill-suited for claims, like respondent's, founded on the Just Compensation Clause of the Fifth Amendment. The Just Compensation Clause specifies a payment of money (or its equivalent)—*i.e.*, "just compensation"—as a condition that must be satisfied for a taking of property by the government to be lawful. Long before this Court inferred a damages remedy in *Bivens*, Congress had provided specific mechanisms (now embodied in the Tucker Act) to effectuate the constitutional guarantee of just compensation. See *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985); *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990). There is no basis for supplanting (or supplementing) those congressionally sanctioned mechanisms with a judicially inferred cause of action for damages under *Bivens*.

A damages remedy against *individual* federal officials, moreover, is fundamentally inconsistent with the nature of the Fifth Amendment right to just compensation, which this Court has repeatedly held is a right that is owed by (and can be violated only by) *the government itself*, not by federal officials in their individual capacity. See, *e.g.*, *Hooe* v. *United States*, 218 U.S. 322, 335-336 (1910); *United States* v. *North Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920). Accordingly, all of the takings cases on which respondent relies—like all Just Compensation Clause claims before this one—involve suits against government

entities, as opposed to individual officials. See, *e.g.*, *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan* v. *City of Tigard*, 512 U.S. 374, 387 (1994); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979).

Recognizing the new constitutional tort urged by respondent and his amici also would have a crippling effect on responsible land management. See Nat'l Wildlife Fed. Amicus Br. 3. Millions of acres of public lands are interspersed with private lands in the West. BLM employees thus regularly interact with private landowners over matters such as rights-of-way, grazing privileges, fish and wildlife, recreational permits, mineral and water rights, cultural resources, and other environmental concerns. BLM administers more than 21,000 grazing permits nationally, including 3500 in Wyoming. Likewise, in 2005, in Wyoming alone, over 1000 rights-of-way actions were issued, amended, renewed, or rejected by BLM. See BLM Wyoming, *2005 Annual Report to the Public*. Dispute over those actions are subject to appeal to the IBLA and a variety of other established remedies. See p. 1, *supra*. But under respondent's theory, any time a private landowner is denied a valuable privilege concerning the use of interspersed public lands (*e.g.*, a right-of-way, grazing permit, or recreational use permit), he could bypass specific administrative remedies and bring a *Bivens*-based Fifth Amendment action claiming interference with his property rights (or retaliation for exercising such rights).

3. Inferring a *Bivens* action for damages against individual government officials is unnecessary in light of the numerous statutory and administrative avenues for relief already available to property owners involved in land use disputes with BLM. For someone like respondent, it is hardly "damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). Aside from unspecified money damages, respondent's complaint sought declaratory and injunctive relief as to the scope of a particular easement, the government's right of administrative access under the grazing and recreational use permits, and the validity of certain

administrative trespass proceedings against respondent. See J.A. 81. Those claims, however, are addressed to the rights and proceedings of the government itself, and therefore are properly brought only against the government itself. In fact, each element of the requested declaratory and injunctive relief either was or could have been the subject of proceedings before BLM and the IBLA and could have been raised in judicial proceedings under the APA seeking review of those administrative decisions. Likewise, any trespass claims could have been asserted under the FTCA and any takings claims under the Tucker Act.

This Court's cases foreclose respondent's attempt to use *Bivens* to circumvent those longstanding avenues of relief expressly provided by Congress and the agency for the resolution of precisely the type of land use disputes at issue here. See *Bush* v. *Lucas*, 462 U.S. 367, 385-388 (1983); *Chilicky*, 487 U.S. at 421-423; *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67-69 (2001); see also Pet. Br. 37-40. For more than a quarter of a century, this Court has "consistently refused to extend *Bivens* liability to any new context." *Malesko*, 534 U.S. at 68; see *id.* at 78 (Scalia, J., concurring). There is no reason to backtrack here.

B. Respondent Has Not Alleged The Violation Of Any Right Protected By The Just Compensation Clause

Respondent does not allege that any of his property rights were actually taken by the government, or that the right to just compensation guaranteed by the Fifth Amendment has otherwise been triggered by any of the regulatory actions about which he complains. To the contrary, respondent stresses that the "essence of [his] claim is *not* that he was subjected to a taking" (Br. 35 (emphasis added)), even though he also emphasizes that his Fifth Amendment claim is based on the Just Compensation Clause and not the Due Process Clause (Br. 11 n.11). At times (Br. 21-24) he characterizes the Fifth Amendment right at issue as a right against retaliation for the exercise of his "property rights," including the "right to exclude" the government from his land. At other times (Br. 24-26) he characterizes it as a right not

to be coerced into waiving his right to just compensation. Either way, the alleged right has no foundation in the text or history of the Just Compensation Clause or this Court's cases.[5]

First, although respondent repeatedly refers to his Fifth Amendment property rights, it is state law, and not the Fifth Amendment, that creates and defines substantive property rights, including the right to exclude. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984). The Fifth Amendment protects the right to exclude others, just as it does other property rights, through (and only through) its guarantee of just compensation. *Kaiser Aetna*, 444 U.S. at 176. But respondent did not exercise any Just Compensation Clause rights when he sought to exclude the government from his land by refusing to agree to a reciprocal easement, or when he complained of alleged government trespasses on his land. Rather, at most, respondent sought to exercise his state law property rights on those occasions. The Fifth Amendment protects citizens from the actual and lawful taking of such rights without "just compensation," but it does not create a constitutional tort for money damages out of any alleged wrongful interference with those rights. See Pet. Br. 41-44.

Second, whether stated as a retaliation claim or a right against coerced waiver, respondent's theory is logically inconsistent and is fundamentally at odds with the actual right protected by the Just Compensation Clause. Respondent asserts that petitioners' regulatory actions were not authorized by federal law, but that they nonetheless violated the Just Compensation Clause, and as a result, respondent has a retaliation claim for damages against the individual officials whose actions he challenges. But respondent cannot have it both ways. If petitioners'

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[5] Contrary to respondent's suggestion (Br. 26), the administrative actions at issue bear no resemblance to "military impressments of private property." Instead, what distinguishes this case is that respondent is demanding the right to use and benefit from *public* lands without agreeing to any of the obligations that traditionally have accompanied the use of such lands. Nothing in the history of the Fifth Amendment (or the Third) supports that one-sided demand.

regulatory actions were not authorized, then under this Court's longstanding case law, the United States has not violated the Just Compensation Clause, and at most respondent would have a trespass suit against the individual officials who committed the unauthorized trespasses. But if those regulatory actions *were* authorized and constituted a taking within the meaning of the Just Compensation Clause, then respondent's suit would lie solely against the United States; he could not state a constitutional claim against the individual government officials. See Pet. Br. 42-43. There is no authority for a substantive right under the Just Compensation Clause against individual officials.[6]

Third, establishing such a right against individual government officials under the Just Compensation Clause would constitutionalize routine land use disputes. Respondent bases his asserted *Bivens* action on the proposition that the "Fifth Amendment protects th[e] state law property interest from invasion in the absence of a taking for which compensation is available." Br. 28. Under that approach, any trespass by government officials on private land—or other alleged invasion of the state law right to exclude—presumably could give rise to a Fifth Amendment violation that is actionable in a *Bivens* action for money damages against individual employees. More to the point, as the allegations in this case underscore, in theory any number of legitimate regulatory actions involving the management of public lands interspersed with private lands could be framed in terms of an alleged trespass that could give rise to a *Bivens* action for money damages. The mere threat of such actions would itself skew necessary land management decisions. See p. 11, *supra*.

Fourth, the Fifth Amendment cases upon which respondent primarily relies (see Br. 23-26), most notably *Nollan* v. *California Coastal Commission*, *supra*, *Dolan* v. *City of Tigard*, *supra*,

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[6] Compensation is presumptively available under the Tucker Act for a taking. But if compensation is not available in a particular instance, then an injunction could properly issue against the government or its officers in their official capacity. See *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998).

and *Kaiser Aetna* v. *United States*, *supra*, do not support his Just Compensation Clause claim, much less inferring a *Bivens* cause of action against individual government officials under that Clause. To begin with, those cases involved suits against the government itself and a claim that property had been *taken* by regulation, which is absent here. Nothing in those cases supports awarding compensatory damages against individual government officials as a means of vindicating a property owner's right to just compensation for a physical or regulatory taking of property, much less doing so where *no taking* is even alleged.

Moreover, *Nollan* and *Dolan* involved an express condition on the property owner's use of his own land. In both cases, the property owners were denied a building permit on their land unless they agreed to some form of a *public* easement. In concluding that the easement lacked an "essential nexus" to any legitimate land-use regulation, the Court expressed particular concern for cases "where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Nollan*, 483 U.S. at 841.

Here, there was no public easement (the easement was for government access only) and no express condition. The only regulatory action BLM took that can fairly be characterized as being based on respondent's refusal to grant the United States a reciprocal easement was the cancellation of a right-of-way over public land—which was conditioned on the receipt of the reciprocal easement. But, as noted, respondent has shifted his focus away from that condition (which is unquestionably appropriate, see *Kaiser Aetna*, 444 U.S. at 189). All that remains is respondent's litany of complaints about BLM's management of public lands. See Part I, *supra*. Those allegations are far afield from the express condition claims in *Nollan* and *Dolan* and, in any event, nothing in *Nollan* and *Dolan* authorizes courts to invalidate or disregard otherwise lawful administrative actions under

the Just Compensation Clause solely because of an alleged subjective intent on the part of public officials to obtain a property interest for the government.

Finally, neither the Fifth Amendment nor *Bivens* supports the creation of a personal damages action for alleged retaliation based on the administrative actions at issue. See Pet. Br. 37-40. Like the court of appeals, respondent has failed to identify any case recognizing an anti-retaliation right grounded in the Just Compensation Clause. Nor has he provided any reason to extend that doctrine to the Just Compensation Clause, which has a unique, textual incentive (the guarantee of "just compensation" for any taking) that ensures the robust exercise of Fifth Amendment rights. The First Amendment right against retaliation provides an additional protection insofar as it prevents retaliation against individuals who exercise their Fifth Amendment rights through petitions for redress. In any event, even if the Fifth Amendment did incorporate an independent right against retaliation (which has gone unnoticed for more than 200 years), the right would not protect against administrative actions—like those at issue—which do not interfere with any substantive right protected by the Just Compensation Clause.[7]

IV. PETITIONERS ARE ENTITLED TO IMMUNITY

At a minimum, petitioners are entitled to qualified immunity from the novel RICO and Fifth Amendment damages claims asserted by respondent. Respondent devotes scarcely two paragraphs of his brief (see pp. 31, 50) to arguing that petitioners are not entitled to qualified immunity, and that passing effort does not withstand scrutiny.

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[7] Respondent suggests (Br. 23-24) that *Dolan* and *Nollan* support creation of a distinct Fifth Amendment anti-retaliation right. That is incorrect. Those decisions are grounded in the substantive protection against uncompensated takings—which respondent does not invoke here. In any event, as discussed above, *Dolan* and *Nollan* are readily distinguishable.

1. Even where an existing right is violated, a defendant is entitled to qualified immunity unless the right was "clearly established" when the officer acted, such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001). "It is important to emphasize that this inquiry 'must be undertaken in light of the *specific context of the case*, not as a broad general proposition.'" *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 201) (emphasis added); see *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) ("the right * * * must have been 'clearly established' in a more particularized, and hence more relevant, sense"). Even assuming petitioners violated an existing right under RICO or the Fifth Amendment, respondent has not come close to establishing that such a right was clearly established in the "specific context of th[is] case." *Saucier*, 533 U.S. at 201.

2. No other court has held that federal officials may be liable under RICO for exercising their lawful authority in the public land management context, much less for seeking a reciprocal right-of-way on behalf of the United States. Pet. Br. 27. And the one other court of appeals that has addressed the application of RICO to a claim of overzealous regulation found such an application to be "ludicrous on its face." *Sinclair* v. *Hawke*, 314 F.3d 934, 943 (8th Cir. 2003). Respondent does not identify any other case that could have given petitioners "fair notice" that their actions could subject them to RICO liability in the situation they confronted. Indeed, respondent "accepts" that there could be no RICO violation at all if, as the court of appeals assumed, Pet. App. 17a-18a, petitioners exercised lawful regulatory authority.

Instead of making any serious attempt to show that petitioners violated a "clearly established" right under RICO, respondent contends (Br. 42-45 & n.34.) that the qualified immunity defense does not apply at all with respect to RICO. That argument was not pressed or passed on in the courts below, was not raised in the brief in opposition, and therefore is not properly

before the Court. See *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 212 n.2 (2004); *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 456 (2004); Sup. Ct. R. 15.2. Respondent's attempt (Br. 42 n.34) to cloak the argument in a jurisdictional veil is unpersuasive. This Court has jurisdiction to review the court of appeals' decision that petitioners were not entitled to qualified immunity, regardless of respondent's arguments concerning the scope of that immunity as a matter of law. In any event, this belated argument is without merit.

This Court has explicitly described the reach of qualified immunity in statutory as well as constitutional terms, see *Harlow*, 457 U.S. at 818, and has held that a plaintiff seeking an exception to the qualified immunity doctrine bears a "heavy burden" because "the doctrine of qualified immunity reflects a balance that has been struck 'across the board,'" *Anderson*, 483 U.S. at 642 (citation omitted). Respondent has not met that burden here. There is no evidence that Congress intended to strip federal officials of their qualified immunity from suit under RICO. Moreover, recognizing qualified immunity in the RICO context is consistent with the policies and traditions of the common law. See *Wyatt* v. *Cole*, 504 U.S. 158, 163-164 (1992); *Tower* v. *Glover*, 467 U.S. 914, 920 (1984). Indeed, the Court has recognized that executive officials are entitled not just to qualified—but to absolute—immunity as to much of the alleged government misconduct on which respondent's RICO claim is based (*e.g.*, allegedly false administrative charges and selective enforcement). See *Butz* v. *Economou*, 438 U.S. 478, 516-517 (1978).[8]

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[8] The courts of appeals that have addressed the question of official immunity in the RICO context have generally concluded that RICO did not abrogate the traditional common law immunities available to executive branch officials. See, *e.g.*, *Cullinan* v. *Abramson*, 128 F.3d 301, 308 (6th Cir. 1997), cert. denied, 523 U.S. 1084 (1998); *Linne* v. *Rideoutte*, 971 F.2d 766 (D.C. Cir. 1992) (per curiam) (unpublished), cert. denied, 507 U.S. 1004 (1993); *Thillens, Inc.* v. *Community Currency Exch. Ass'n of Illinois, Inc.*, 729 F.2d 1128, 1129-1130 (7th Cir.), cert. dismissed, 469 U.S. 976 (1984).

The cases respondent cites for the proposition that the Court has been hesitant to expand the reach of qualified immunity in the Section 1983 context are inapposite because they involve private, non-governmental defendants. See Br. 43 (citing *Wyatt* v. *Cole*, *supra*; *Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997)). As this Court has explained, the policy considerations that support extending the defense to government officials do not apply in the private context. See *Wyatt*, 504 U.S. at 167-168; *Richardson*, 521 U.S. at 407-412. Furthermore, although respondent suggests that qualified immunity should be inapplicable in the RICO context to the extent that the qualified immunity and merits inquiries could overlap, see Resp. Br. 45, this Court has rejected the proposition that the qualified immunity inquiry should be disregarded where the merits and qualified immunity questions overlap, see *Saucier*, 533 U.S. at 203; *Anderson*, 483 U.S. at 643, and instead emphasized the important values served by faithfully applying an independent qualified immunity inquiry.

3. Nor has petitioner shown the violation of any "clearly established" Fifth Amendment right. As respondent himself acknowledges, "there are no reported cases concerning retaliation against the exercise of Just Compensation Clause rights." Br. 31; accord Pet. App. 16a ("[N]o court has previously explicitly recognized the right to be free from retaliation for the exercise of Fifth Amendment rights"). Likewise, no court has ever squarely held that a Just Compensation Clause-based, Fifth Amendment claim is actionable under *Bivens*. See Pet. Br. 27-28. It follows that there is no case law applying the novel Just Compensation Clause right that respondent asks this Court to adopt in the context of the management of interspersed public and private lands. The fact that respondent has failed to show the violation of any "clearly established" Fifth Amendment right in the specific context that petitioners faced is underscored by respondent's acknowledgment that, at a minimum, the right-of-way over public land gave petitioners a "plausible basis" to insist on a reciprocal easement over private land. Resp. Br. 14.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss the complaint.

Respectfully submitted.

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Solicitor General

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